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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES BYON NISHI, Defendant and Appellant.	A129724 (Marin County Super. Ct. No. SC169462A)

Defendant Charles Nishi was convicted following a jury trial of one count of attempting to deter or resist an executive officer in the performance of duty in violation of Penal Code section 69.[1] In this appeal he challenges the denial of his pretrial motion to suppress evidence, and complains that he was denied the right to testify at trial. He also argues that the conviction is not supported by the evidence, and objects to the imposition of a probation condition that directs him to undergo a psychological evaluation and take medication as directed by a physician. In a supplemental brief, defendant claims instructional error and improper denial of his motion for self-representation. We conclude that defendant had no reasonable expectation of privacy in the area searched, and was not denied the right to testify at trial. The evidence supports the conviction and defendant's motion for self-representation was untimely. No instructional error occurred. The medication condition of probation is both reasonably

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II., IV., V., and VI.

[1] All further statutory references are to the Penal Code unless otherwise indicated. Defendant was acquitted by the jury of additional counts of making criminal threats. (§ 422.)

related to deterring future criminality, and neither vague nor overbroad. We therefore affirm the judgment.

STATEMENT OF FACTS

The United States Air Force Freedom of Information and Privacy Act Office of the Department of Defense received an e-mail signed by Charles Nishi, who referred to himself as "The Shepherd," dated March 27, 2010, which was designated as an "EMERGENCY COMMUNICATION." In the e-mail Nishi stated he had been located after numerous California Highway Patrol helicopter flights, and complained that the California Department of Fish and Game had been repeatedly and unlawfully shooting at protected mountain lions in the "Open Space" to "PROVOKE AN ATTACK which endangers the public." Nishi petitioned for an immediate "shut down" of "Marin County Sheriffs and Fish & Games operations," and asked the United States Fish and Wildlife Service and the Department of Justice to "take control of all wild life activities" in the Marin County Indian Valley Open Space Preserve to prevent further slaughter of mountain lions. He also declared: "I am armed and will now fire on all Sheriff and Fish & Game after this email so either shut them down or put some boots on the ground to join the battle, remember that if they kill me what is going to happen to the human race by APOLLO or the same beings on Codex Dresden." Defendant further pointed out he had informed the California Department of Fish and Game that the United States Air Force was "monitoring their activities" through air support.

The Department of Defense forwarded the e-mail to the Marin County Sheriff's Department on March 29, 2010. Deputy Sheriff Christopher Henderson, an officer who had often investigated cases of "criminal threats" to law enforcement, was given the e-mail with directions to "take care of it." Deputy Henderson reviewed the e-mail and was alarmed by its nature, detail, length and content. He decided the message represented a "credible threat" and "safety issue," so he issued a computer-generated "Officer Safety/Welfare Check" bulletin, which he sent to regional law enforcement agencies, including the Department of Fish and Game. In the bulletin the deputy identified defendant Charles Nishi of Novato as the author of an angry, confrontational e-mail sent

to military officials, and included a description and photograph of him. The bulletin also mentioned a warning from defendant in the e-mail that he "is armed and will 'fire on' Sheriff and Fish and Game personnel if confronted." Deputy Henderson's primary objective in issuing the bulletin was to effectuate a medical evaluation of defendant.

Brian Sanford, superintendant in charge of operations for the Indian Valley Open Space Preserve, received the e-mail and Deputy Henderson's bulletin. As a result, he posted the e-mail and directed his staff "not to go into that preserve" until contact was made with defendant. Charles Armor, regional manager for the Bay Delta region of the California Department of Fish and Game, became concerned for the safety of his staff after learning of the contents of defendant's e-mail. He advised his staff "not to wear their uniforms," and be "a little more vigilant," while working in the field.

Marin County Deputy Sheriff Brenndon Bosse, who has patrol responsibilities in the Indian Valley Open Space Preserve, also received defendant's e-mail and the associated bulletin from Deputy Henderson. He was delegated the duty to proceed to the Indian Valley Open Space Preserve to contact defendant. Deputy Bosse was acquainted with defendant due to prior contacts: his prior infractions in 2009 for camping in the preserve without a permit, and unsubstantiated reports made by defendant of shooting of mountain lions. Defendant had been cooperative and non-threatening with Deputy Bosse in the past. Nevertheless, "because of the threatening statement" in the e-mail that he "would fire upon Sheriff's deputies or Fish and Game officers," Bosse stayed near cover as he hiked in the preserve searching for defendant.

About 6:00 p.m. on March 31, 2010, Deputy Bosse located defendant at a fire road in the Indian Valley Open Space Preserve. Defendant affirmed he sent the e-mail, but did not acknowledge he wrote the paragraph that threatened to "fire upon Sheriff's deputies or Fish and Game officers." Defendant consented to a search for weapons, and exclaimed that the e-mail "worked" by keeping the officers "off the preserve." He was then arrested and transported to the psychiatric facility at Marin County General Hospital. During a subsequent search of defendant's campsite Bosse discovered boxes of new shotgun shells under a tarp next to a tent, although no firearm was found.

DISCUSSION

I. The Denial of the Motion to Suppress Evidence.

Defendant complains of the warrantless search of his campsite, and specifically the seizure of the boxes of shotgun shells from a tarp "immediately surrounding" his tent. Defendant argues that his "expectation of privacy in the campsite was subjectively as well as objectively reasonable, given his homeless status and the presumed willingness of society to recognize an expectation of privacy for a homeless camper on secluded public land." Defendant's position is that the tarp was within the "curtilage" of his campsite, and thus "entitled to Fourth Amendment protections." The Attorney General responds that defendant "had no reasonable expectation of privacy in the location where the ammunition was found," so no Fourth Amendment violation occurred as a result of the warrantless search.

In reviewing the trial court's denial of a motion to suppress evidence, we view the record in the light most favorable to the trial court's ruling, deferring to those express or implied findings of fact supported by substantial evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182 [58 Cal.Rptr.2d 385, 926 P.2d 365]; *People v. Miranda* (1993) 17 Cal.App.4th 917, 922 [21 Cal.Rptr.2d 785].) We independently review the trial court's application of the law to the facts. (*People v. Alvarez*, *supra*, at p. 182.)

The threshold issue before us is " 'whether the challenged action by the officer "has infringed an interest of the defendant which the Fourth Amendment was designed to protect." [Citations.] . . .' [Citations.]" (*People v. Shepherd* (1994) 23 Cal.App.4th 825, 828 [28 Cal.Rptr.2d 458].) " 'An illegal search or seizure violates the federal constitutional rights only of those who have a legitimate expectation of privacy in the invaded place or seized thing. [Citation.] The legitimate expectation of privacy must exist in the particular area searched or thing seized in order to bring a Fourth Amendment challenge.' [Citation.]" (*People v. McPeters* (1992) 2 Cal.4th 1148, 1171 [9 Cal.Rptr.2d 834, 832 P.2d 146], italics omitted; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 971 [95 Cal.Rptr.2d 377, 997 P.2d 1044]; *People v. Roybal* (1998) 19 Cal.4th 481, 507 [79 Cal.Rptr.2d 487, 966 P.2d 521].)

"A defendant has the burden at trial of establishing a legitimate expectation of privacy in the place searched or the thing seized." (*People v. Jenkins, supra,* 22 Cal.4th 900, 972.) "A person seeking to invoke the protection of the Fourth Amendment must demonstrate both that he harbored a subjective expectation of privacy and that the expectation was objectively reasonable. [Citation.] An objectively reasonable expectation of privacy is 'one society is willing to recognize as reasonable.' [Citation.] Stated differently, it is an expectation that has ' " 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.' " ' [Citation.]" (*People v. Hughston* (2008) 168 Cal.App.4th 1062, 1068 [85 Cal.Rptr.3d 890] (*Hughston*); see also *Smith v. Maryland* (1979) 442 U.S. 735, 740 [61 L.Ed.2d 220, 99 S.Ct. 2577]; *United States v. Dodds* (10th Cir. 1991) 946 F.2d 726, 728 (*Dodds*).)

" 'A "reasonable" expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. [Citation.]' [Citation.]" (*Rains v. Belshé* (1995) 32 Cal.App.4th 157, 173 [38 Cal.Rptr.2d 185].) "There is no set formula for determining whether a person has a reasonable expectation of privacy in the place searched, but the totality of the circumstances are considered. [Citation.] Among the factors sometimes considered in making the determination are whether the defendant has a possessory interest in the thing seized or place searched [citation], 'whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that it would remain free from governmental invasion; whether he took normal precautions to maintain his privacy and whether he was legitimately on the premises.' [Citation.]" (*In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1132 [12 Cal.Rptr.3d 483].)

The most significant, and ultimately controlling, factor in the case before us is that defendant was not lawfully or legitimately on the premises where the search was conducted. The uncontradicted evidence reveals that camping on the Indian Valley Open Space Preserve was prohibited without a permit. Defendant had no authorization to camp within or otherwise occupy the public land. On at least four or five recent occasions he

had been cited by officers for "illegal camping" and evicted from other campsites in the preserve.

Thus, both the illegality, and defendant's awareness that he was illicitly occupying the premises without consent or permission, are undisputed. "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." (*Rakas v. Illinois* (1978) 439 U.S. 128, 143, fn. 12 [58 L.Ed.2d 387, 99 S.Ct. 421].) Defendant was not in a position to legitimately consider the campsite—or the belongings kept there—as a place society recognized as private to him. (*Dodds, supra,* 946 F.2d 726, 728–729.) Nor did he have the right to exclude others from that place. He had no ownership, lawful possession, or lawful control of the premises searched. (See *United States v. Gale* (D.C. Cir. 1998) 136 F.3d 192, 195–196; *United States v. Carr* (10th Cir. 1991) 939 F.2d 1442, 1446.) A "person can have no reasonable expectation of privacy in premises on which they are wrongfully present . . . ." (*United States v. Gutierrez-Casada* (D.Kan. 2008) 553 F.Supp.2d 1259, 1270; see also *United States v. McRae* (6th Cir. 1998) 156 F.3d 708, 711; *Dodds, supra,* at pp. 728–729.)

Defendant's unlawful, temporary occupation of the campsite distinguishes the present case from *United States v. Gooch* (9th Cir. 1993) 6 F.3d 673, 676–677, in which the court concluded that the defendant had an objectively reasonable expectation of privacy in a tent pitched for several days in a public campground where he was "legally permitted to camp." (*Id.* at p. 677; see also *United States v. Basher* (9th Cir. 2011) 629 F.3d 1161, 1167–1168.) In *United States v. Sandoval* (9th Cir. 2000) 200 F.3d 659, 660–661 (*Sandoval*), the court extended the holding in *Gooch* to find a legitimate expectation of privacy associated with the seizure of a medicine bottle discovered during a search of a "makeshift tent" "located on Bureau of Land Management" property, (*id.* at p. 660), where it was "unclear whether Sandoval had permission to be there." (*Id.* at p. 661.) The defendant's tent in *Sandoval* was located in an area that was heavily covered by vegetation and virtually impenetrable. In addition, the tent was closed on all four sides,

and the medicine bottle was not visible from outside. (*Id.* at p. 660.) The court in *Sandoval* concluded: "[W]e do not believe the reasonableness of Sandoval's expectation of privacy turns on whether he had permission to camp on public land. Such a distinction would mean that a camper who overstayed his permit in a public campground would lose his Fourth Amendment rights, while his neighbor, whose permit had not expired, would retain those rights." (*Id.* at p. 661, fn. omitted.)

Similarly, in *Hughston, supra,* 168 Cal.App.4th 1062, 1068–1069, 1071, the defendant was found to have "a reasonable expectation of privacy" for Fourth Amendment purposes in an aluminum frame covered with tarps that was erected within a designated site on land specifically set aside for camping during a music festival. The court in *Hughston* declared: " 'One should be free to depart the campsite for the day's adventure without fear of this expectation of privacy being violated.' " (*Id.* at p. 1070, quoting *People v. Schafer* (Colo. 1997) 946 P.2d 938, 944.)

Here, in contrast to *Sandoval* and *Hughston*, not only was defendant clearly camped in a prohibited location, the shotgun shells were seized from *outside* his tent, in a pile of debris under a loose tarp. While a tent located in a public campground may be considered a private area where people sleep and keep valuables, functionally somewhat comparable to a house, apartment, or hotel room, the remainder of defendant's unauthorized, undeveloped campsite was a dispersed, ill-defined site, exposed and open to public view. The area around the tent was not within a defined residential curtilage in which defendant had a reasonable expectation of privacy. (*United States v. Basher, supra,* 629 F.3d 1161, 1169.) Also, after his repeated removal by officers from campsites he had occupied in the same preserve in the recent past, defendant was conscious of the illegality, which further tends to negate his legitimate expectation of privacy in that location. (*People v. Thomas* (1995) 38 Cal.App.4th 1331, 1333–1334 [45 Cal.Rptr.2d 610] (*Thomas*).)

We find the decision in *United States v. Ruckman* (10th Cir. 1986) 806 F.2d 1471, persuasive in the present case. In *Ruckman*, the defendant lived in a natural cave located in a remote area of southern Utah on land owned by the United States and controlled by

the Bureau of Land Management. He attempted to enclose the cave by "fashioning a crude entrance wall from boards and other materials which surrounded a so-called 'door.' " (*Id*. at p. 1472.) A warrantless search of the cave resulted in seizure of firearms and "anti-personnel booby traps." (*Ibid*.) As in the case before us, the evidence established that "Ruckman was admittedly a trespasser on federal lands and subject to immediate ejectment" (*ibid.*) by authorities "at any time." (*Id*. at p. 1473.) The court pointed out that " 'whether the occupancy and construction were in bad faith,' " and the " 'legal right to occupy the land and build structures on it,' " were factors " 'highly relevant' " to the issue of the defendant's expectation of privacy. (*Id*. at p. 1474, quoting *Amezquita v. Hernandez-Colon* (1st Cir. 1975) 518 F.2d 8, 12.) The court determined "that Ruckman's cave is not subject to the protection of the Fourth Amendment." (*Ruckman, supra,* at p. 1472.)

Here, as in *Ruckman*, defendant was a trespasser on public land, and occupied the campsite without authority in bad faith. "Where, as here, an individual 'resides' in a temporary shelter on public property without a permit or permission and in violation of a law which expressly prohibits what he is doing, he does *not* have an objectively reasonable expectation of privacy. (*United States* v. *Ruckman* (10th Cir. 1986) 806 F.2d 1471, 1474 [rejecting a claim of privacy in a cave on federal property because the determination whether a place constitutes a person's 'home' must take into account the means by which it was acquired and whether it is occupied without any legal right]; *Amezquita* v. *Hernandez-Colon* (1st Cir. 1975) 518 F.2d 8, 11–12 [no privacy right in a squatter's community on public property]; *State* v. *Cleator* (1993) 71 Wn.App. 217 [857 P.2d 306, 308–309] [no privacy right in a tent on public property]; *State* v. *Mooney* (1991) 218 Conn. 85 [588 A.2d 145, 152, 154] [no privacy right in a squatter's 'home' under a bridge abutment].)" (*Thomas, supra,* 38 Cal.App.4th 1331, 1334–1335.)[2] We

[2] *Thomas* held that a homeless man living in a cardboard box on a public sidewalk, in violation of a law expressly prohibiting him from doing so, did not have a reasonable expectation of privacy in the box. (*Thomas, supra,* 38 Cal.App.4th 1331, 1333–1335.)

therefore conclude that the warrantless search of defendant's campsite did not violate the Fourth Amendment.

II. The Failure of the Trial Court to Advise Defendant of his Right to Testify.

Defendant claims that he was denied his "constitutional right, guaranteed by the Fifth, Sixth and Fourteenth Amendments, to testify on his own behalf." The focus of his complaint is on the failure of the trial court to advise him of "his right to testify or to ascertain that [he] intended to waive that right," which he argues "was fundamental error" and mandates reversal.

The record illustrates that after the prosecution rested, defense counsel indicated on several occasions, without comment from defendant, that the defense would not present any witnesses or evidence. After instructions and argument of counsel, the jury was excused for deliberations, again without protest or statement by defendant. In other words, the case was fully tried before a jury, then argued by both sides and the jury instructed without any indication by defendant he desired to personally testify. After the jury was in deliberation and the court addressed for the record previous instructional and evidentiary objections by the defense, defendant declared: "I'll get to speak soon, won't I?" The court agreed that he would. Defendant then queried, "That's to testify, right?" The court offered the curious reply, "Thank you."

The following day, defendant appeared with substitute counsel for discussion of a note from the jury. Defendant asked, " Am I going to be able to testify?" The court told him no, the "decision was made by your attorney, the case has been submitted to the jury." During the ensuing discussion, defendant proclaimed that he was "constantly told" by the court and his counsel that he "was gonna [*sic*] testify," and his testimony would contradict everything his counsel "has said in this matter." Defendant also protested that defense counsel advised him he had "no right in any decisions" in the case. He then repeated his complaint that he must be "allowed to testify," and had not been given an opportunity to subpoena witnesses. The court noted defendant's repetition of objections and stated, "we will address that when the time becomes appropriate."

Finally, when the jury returned to the courtroom to announce its verdict, defendant again proclaimed that he "was supposed to testify here," and "didn't get a chance." After the verdicts were read and the jury was dismissed, defendant reiterated his protest that he was prevented from testifying, and explained to the court that he was never explicitly asked if he wanted to testify.

We are of course cognizant of a fundamental rule: "The defendant in a criminal proceeding has a right to testify over the objection of his or her counsel. As [the Supreme Court] ha[s] explained in that context, 'the right to testify in one's own behalf is of such fundamental importance that a defendant who timely demands to take the stand contrary to the advice given by his counsel has the right to give an exposition of his defense before a jury. [Citation.] The defendant's insistence upon testifying may in the final analysis be harmful to his case, but the right is of such importance that every defendant should have it in a criminal case. Although normally the decision whether a defendant should testify is within the competence of the trial attorney [citation], where, as here, a defendant insists that he wants to testify, he cannot be deprived of that opportunity.' [Citation.]" (*People v. Allen* (2008) 44 Cal.4th 843, 860 [80 Cal.Rptr.3d 183, 187 P.3d 1018]; see also *People v. Bell* (2010) 181 Cal.App.4th 1071, 1080 [105 Cal.Rptr.3d 259].)

But here, defendant did not assert his right to testify during trial. To the contrary, when asked, neither he nor his counsel expressed that defendant was interested in offering his own testimony, or any other evidence. An express personal waiver of the right to testify is not necessary. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1052–1053 [60 Cal.Rptr.2d 225, 929 P.2d 544]; *People v. Towey* (2001) 92 Cal.App.4th 880, 884 [112 Cal.Rptr.2d 326].) The decision whether to testify or whether to present a defense at the guilt phase of trial may be waived by counsel alone. (*People v. Hinton* (2006) 37 Cal.4th 839, 873–874 [38 Cal.Rptr.3d 149, 126 P.3d 981].) Moreover, "A trial court has no duty to give such advice or seek an explicit waiver, unless a conflict with counsel comes to its attention." (*People v. Enraca* (2012) 53 Cal.4th 735, 762 [137 Cal.Rptr.3d 117, 269 P.3d 543].) " '[I]t is only in case of an express conflict arising between the defendant and counsel that the defendant's desires must prevail. . . .' [Citations.]"

(*People v. Bradford* (1997) 15 Cal.4th 1229, 1332 [65 Cal.Rptr.2d 145, 939 P.2d 259]; see also *In re Horton* (1991) 54 Cal.3d 82, 95 [284 Cal.Rptr. 305, 813 P.2d 1335].) " ' " '[A] trial judge may safely assume that a defendant, who is ably represented and who does not testify is merely exercising his Fifth Amendment privilege against self-incrimination and is abiding by his counsel's trial strategy; otherwise, the judge would have to conduct a law seminar prior to every criminal trial.' " [Citation.] When the record fails to disclose a timely and adequate demand to testify, "a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity." [Citations.]' [Citations.]" (*People v. Enraca, supra,* at pp. 762–763.)

Nothing in the record indicates that the trial court was alerted to a conflict between defendant and his counsel over the presentation of defendant's testimony. As defendant points out, the record is replete with defendant's expressions of dissatisfaction with his attorney, as manifested by numerous motions to substitute counsel (*People v. Marsden* (1970) 2 Cal.3d 118 [84 Cal.Rptr. 156, 465 P.2d 44]), along with his repeated efforts to interject his own objections or statements at trial. As we read the record before us, however, none of the motions or objections by defendant informed the trial court that defendant's assertion of the right to testify was the subject of a tactical conflict with counsel. Defendant did not specifically express that he wanted to testify until after the presentation of evidence was complete, instructions were given, and the jury retired to deliberate. Thus, the court was not required to advise defendant of his right to testify or grant defendant the right to take the stand.

III. The Evidence to Support the Conviction of a Violation of Section 69.

Next, defendant maintains that his conviction of a violation of section 69 is not supported by the evidence. Defendant contends that his e-mail neither "directly threatened the sheriff or Fish & Game department," nor "showed any intent that the federal government convey" his threat to those officers. He also argues that his "threat did not have as its requisite purpose the deterrence of local officials from performing their duties," but rather was "intended to convince the federal agencies" to intervene to

halt actions defendant considered unlawful – that is, the unauthorized shooting of mountain lions.

A. The Standard of Review.

We first consider the nature of our review of the evidence. Defendant requests that we "employ [an] independent review standard," due to the "plausible First Amendment defense to [the] charge."

"In *Bose Corp. v. Consumers Union of U. S., Inc*. (1984) 466 U.S. 485, 499 [80 L.Ed.2d 502, 104 S.Ct. 1949], the United States Supreme Court explained that 'in cases raising First Amendment issues . . . an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." ' [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 36 [82 Cal.Rptr.3d 323, 190 P.3d 664].) "[W]hen the appellate issue is whether a particular communication falls outside the protection of the First Amendment, independent review is called for, 'both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.' [Citation.]" (*Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1161–1162 [72 Cal.Rptr.3d 231] (*Krinsky*).) "Relying on *Bose*," the California Supreme Court "held in *In re George T.* [(2004) 33 Cal.4th 620, [16 Cal.Rptr.3d 61, 93 P.3d 1007]], that when a plausible First Amendment defense is raised, a reviewing court should independently review the entire record in determining the sufficiency of evidence supporting a juvenile court's finding that the minor made a criminal threat within the meaning of section 422." (*Lindberg, supra,* at p. 37.) The court "explained that independent review of the constitutionally relevant facts is necessary in cases involving First Amendment issues 'to ensure that a speaker's free speech rights have not been infringed by a trier of fact's determination that the communication at issue constitutes a criminal threat.' ([*In re George T., supra,*] at p. 632.) Independent review is employed 'precisely to make certain that what the

government characterizes as speech falling within an unprotected class actually does so.' [Citation.]" (*Ibid.*)

"Thus, when called upon to draw ' "the line between speech unconditionally guaranteed and speech [that] may legitimately be regulated," ' 'we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." ' [Citations.]" (*Krinsky, supra,* 159 Cal.App.4th 1154, 1161–1162.) " 'Independent review is not the equivalent of de novo review "in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes" the outcome should have been different. [Citation.] Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are findings of fact that are not relevant to the First Amendment issue." (*People v. Lindberg, supra,* 45 Cal.4th 1, 36.) "[T]o the limited extent that the court below resolved evidentiary disputes, made credibility determinations, or made findings of fact that are not relevant to the First Amendment issue, we uphold those rulings if they are supported by substantial evidence." (*Krinsky, supra,* at p. 1162, citing *In re George T., supra,* 33 Cal.4th 620, 634.)

Here, the charge of a violation of section 69 focused on defendant's proclamation that he was "armed and will now fire on all Sheriff and Fish & Game after this email." The direct threat of violence to Fish and Game or Sheriff's Department officials who entered the Marin County Indian Valley Preserve was not protected speech under the First Amendment. (*People v. Monterroso* (2004) 34 Cal.4th 743, 776 [22 Cal.Rptr.3d 1, 101 P.3d 956].) "[T]rue threats are not constitutionally protected." (*People v. Dunkle* (2005) 36 Cal.4th 861, 919 [32 Cal.Rptr.3d 23, 116 P.3d 494].) As the California Supreme Court explained in *People v. Toledo* (2001) 26 Cal.4th 221, 233 [109 Cal.Rptr.2d 315, 26 P.3d 1051], "penalizing speech does not offend First Amendment principles as long as, ' "the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection." ' [Citations.]" (*People v. Jackson*

(2009) 178 Cal.App.4th 590, 598 [100 Cal.Rptr.3d 539].) " ' "[T]he state may penalize threats, even those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection. [Citations.] In this context, the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, ' "communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs . . . ." ' [Citations.]" . . . A statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity. [Citation.]' [Citations.]" (*City of San Jose v. Garbett* (2010) 190 Cal.App.4th 526, 536–537 [118 Cal.Rptr.3d 420].)

" ' "When a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside First Amendment protection." ' [Citations.]" (*People v. Wilson* (2010) 186 Cal.App.4th 789, 804 [112 Cal.Rptr.3d 542].) Further, " ' "As long as the threat reasonably appears to be a serious expression of intention to inflict bodily harm [citation] and its circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out," a statute proscribing such threats "is not unconstitutional for lacking a requirement of immediacy or imminence." ' [Citations.]" (*People v. Monterroso, supra,* 34 Cal.4th 743, 776.)

Therefore, "defendant has not raised any First Amendment arguments, and an independent standard of review is not applicable. When the First Amendment is not implicated, defendant's sufficiency of the evidence challenge is evaluated under the substantial evidence test. [Citations.] 'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears "that upon no hypothesis

whatever is there sufficient substantial evidence to support [the conviction]." [Citation.]' [Citation.]" (*People v. Wilson, supra,* 186 Cal.App.4th 789, 805.) The standard is " 'whether any rational trier of fact could find the legal elements [of section 69] satisfied beyond a reasonable doubt . . . .' [Citation.]" (*People v. Lindberg, supra,* 45 Cal.4th 1, 36–37.)

B. The Evidence that Supports the Conviction of a Violation of Section 69.

Section 69, under which defendant was charged and convicted, states, "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment." "The statute sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814 [66 Cal.Rptr.2d 701, 941 P.2d 880].) The first form of a violation of section 69 "encompasses attempts to deter either an officer's immediate performance of a duty imposed by law or the officer's performance of such a duty at some time in the future." (*In re Manuel G., supra,* at p. 817, italics omitted.) The second form of violating section 69 "assumes that the officer is engaged in such duty when resistance is offered," and "the officers must have been acting lawfully when the defendant resisted arrest." (*In re Manuel G., supra,* at p. 816.)

The case against defendant proceeded exclusively on the first form of a violation of section 69, which has "been called ' "attempting to deter," ' " (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 984 [77 Cal.Rptr.3d 912]) and is "established by ' "[a] threat, unaccompanied by any physical force" ' and may involve either an officer's immediate or future performance of his duty. [Citations.]" (*Id.* at p. 985.) To avoid infringement on protected First Amendment speech, "the term 'threat' has been limited to

mean a threat of unlawful violence used in an attempt to deter the officer. [Citations.] The central requirement of the first type of offense under section 69 is an attempt to deter an executive officer from performing his or her duties imposed by law; unlawful violence, or a threat of unlawful violence, is merely the means by which the attempt is made." (*In re Manuel G., supra,* 16 Cal.4th 805, 814–815; see also *People v. Superior Court* (*Anderson*) (1984) 151 Cal.App.3d 893, 896–897 [199 Cal.Rptr. 150].) "[A] violation of section 69 requires a specific intent to interfere with the executive officer's performance of his duties . . . ." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153 [124 Cal.Rptr.2d 373, 52 P.3d 572]; see also *People v. Patino* (1979) 95 Cal.App.3d 11, 27 [156 Cal.Rptr. 815].)

We find substantial evidence in the record to support the conviction. While defendant submits that the purpose of his e-mail was merely to dissuade the Fish and Game and Sheriff's departments from continuing to proceed with a program of unlawfully eradicating mountain lions or his cats, either directly or through the assistance of federal authorities, the evidence also convincingly demonstrates an intent to deter officials from patrolling or otherwise performing duties in the Indian Valley Open Space Preserve by threatening to "fire on" them if they appeared there. Attempts to deter either an officer's immediate performance of a duty or the performance of such a duty at some time in the future constitutes a violation of the statute. (*In re Manuel G., supra,* 16 Cal.4th 805, 817.) Defendant essentially acknowledged as much when he was encountered by Deputy Bosse, and remarked that the e-mail "worked" by keeping the officers "off the preserve." Moreover, the message had the contemplated effect. The superintendant in charge of operations for the Indian Valley Open Space Preserve directed his staff "not to go into that preserve" until contact was made with defendant. The regional manager for the Bay Delta region of the Department of Fish and Game advised his staff "not to wear their uniforms," and be "a little more vigilant when they're working in the fields." Deputy Bosse testified that in light of the e-mail, he patrolled with greater care during his search for defendant.

That the e-mail was not separately or directly sent to the intended victims fails to negate proof of either an attempt to deter or prevent an officer from performing a duty or the requisite specific intent to interfere with the executive officer's performance of duties. The statute does not require that a threat be personally communicated to the victim by the person who makes the threat. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861 [123 Cal.Rptr.2d 193]; *In re David L.* (1991) 234 Cal.App.3d 1655, 1659 [286 Cal.Rptr. 398].) The inference may be drawn from the evidence that defendant intended, and expected or at least foresaw, a message with an unequivocal threat to shoot Fish and Game and Sheriff's Department officers would be conveyed from the Department of Defense to the intended law enforcement targets of the threat. (*People v. Hamilton* (2009) 45 Cal.4th 863, 936 [89 Cal.Rptr.3d 286, 200 P.3d 898].) Section 69 also does not require a showing that defendant had the present ability to carry out the threats; evidence that the letter contained the threats was sufficient to support a finding that defendant violated section 69. (*Hamilton*, *supra*, at p. 936; *People v. Hines* (1997) 15 Cal.4th 997, 1060 [64 Cal.Rptr.2d 594, 938 P.2d 388].) We conclude that the elements of a violation of section 69 are established by substantial evidence.

IV. The Imposition of a Medication Condition of Probation.

Defendant also challenges the trial court's imposition of a probation condition that requires him to "take medication as directed and submit to blood/urine testing to monitor medication levels if requested." Defendant points out that "the record reveals no evidence" of a condition, or even a psychological evaluation of him, that required medication. Therefore, he asserts that "the court was unable to evaluate the appropriateness of this probation condition and therefore erred in imposing the condition." Defendant also argues that the medication condition infringes on his "constitutionally protected liberty interest under the due process clause to refuse administration of antipsychotic medication," and his "right to privacy secured by the California Constitution." (See *Unites States v. Williams* (9th Cir. 2004) 356 F.3d 1045, 1053–1055.)

We review the reasonableness of the imposition of the search and seizure condition in accordance with established principles. " 'When granting probation, courts have broad discretion to impose restrictive conditions to foster rehabilitation and to protect public safety. Penal Code section 1203.1 [permits] the court to impose . . . "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, . . . and specifically for the reformation and rehabilitation of the probationer." . . .' [Citation.]" (*People v. Mason* (1971) 5 Cal.3d 759, 764 [97 Cal.Rptr. 302, 488 P.2d 630].) A probation condition "will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486 [124 Cal.Rptr. 905, 541 P.2d 545]; *People v. Rugamas* (2001) 93 Cal.App.4th 518, 522 [113 Cal.Rptr.2d 271].) "Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*People v. Lent, supra,* at p. 486; see also *In re Corona* (2008) 160 Cal.App.4th 315, 321 [72 Cal.Rptr.3d 736]; *People v. Zaring* (1992) 8 Cal.App.4th 362, 370 [10 Cal.Rptr.2d 263].) Probation conditions that restrict constitutional rights are valid "if they are narrowly drawn to serve the important interests of public safety and rehabilitation [citation] and if they are specifically tailored to the individual probationer." (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084 [22 Cal.Rptr.2d 893]; see also *In re Tyrell J.* (1994) 8 Cal.4th 68, 82 [32 Cal.Rptr.2d 33, 876 P.2d 519]; *People v. Peck* (1996) 52 Cal.App.4th 351, 362 [61 Cal.Rptr.2d 1].)

" '[A] reviewing court should not disturb the exercise of a trial court's discretion unless it appears that there has been a miscarriage of justice. . . . "It is fairly deducible from the cases that one of the essential attributes of abuse of discretion is that it must clearly appear to effect injustice. [Citations.] Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion,

and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." [Citations.]' [Citation.]" (*People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 42 [117 Cal.Rptr.2d 738]; see also *People v. Balestra* (1999) 76 Cal.App.4th 57, 63 [90 Cal.Rptr.2d 77]; *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1391 [44 Cal.Rptr.2d 501].)

We note at the outset that the Attorney General asserts defense counsel registered no objection to the medication requirement below. The law governing forfeiture of challenge to a condition of probation was spelled out in *People v. Welch* (1993) 5 Cal.4th 228, 234–235 [19 Cal.Rptr.2d 520, 851 P.2d 802]: "It is settled that failure to object and make an offer of proof at the sentencing hearing concerning alleged errors or omissions in the probation report waives the claim on appeal. [Citations.] No different rule should generally apply to probation conditions under consideration at the same time. A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. The parties must, of course, be given a reasonable opportunity to present any relevant argument and evidence. A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis." (Fn. omitted.)

In *In re Sheena K.* (2007) 40 Cal.4th 875, 881–882 [55 Cal.Rptr.3d 716, 153 P.3d 282], the court reiterated the rule announced in *Welch* that a criminal defendant's failure to challenge the "reasonableness" of a probation condition at trial forfeits the claim on appeal. The court in *Sheena* "reasoned that an adult probationer who elects to receive probation in lieu of incarceration fairly may be charged with the need to timely challenge any conditions imposed and that application of the forfeiture doctrine would deter the promulgation of invalid conditions in the trial court and decrease the number of appeals contesting such conditions." (*Id*. at p. 882.) The court also took the opportunity in *Sheena* to articulate an exception to the rule of forfeiture when the basis for the challenge is that a probation condition is unconstitutionally vague or overbroad. (*Id*. at p. 889; see

also *In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143 [116 Cal.Rptr.3d 84].) A "challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court *can* be said to present a pure question of law" that the reviewing court may properly address even if no objection was presented below. (*Sheena K., supra*, at p. 887; see also *In re Shaun R., supra*, at p. 1143.) "Thus, when a facial challenge is made to the constitutionality of a probation condition, there is no need to preserve the claim by an objection in the juvenile court." (*In re R.P.* (2009) 176 Cal.App.4th 562, 566 [97 Cal.Rptr.3d 822].)

Defendant does not present a constitutional challenge to the probation condition in the present case. While he refers to his "constitutionally protected" right to refuse involuntary administration of psychotropic medication, his claim of invalidity of the medication condition is based exclusively on the absence of "evidence supporting the necessity of medication for defendant." He specifically complains of the lack of a medical evaluation or examination to support the requirement of medication. His claim of error is not subject to review without reference to the particular sentencing record developed in the trial court.

Defendant did not forfeit his challenge to the medication condition on appeal, however. He initially expressed unequivocal rejection of any directives to submit to psychological evaluations or take any prescribed medications. Defendant declined to concede that he suffered from any mental disorder that required treatment. He ultimately agreed to abide by the medication condition articulated by the court only with the explicit proviso that he retained his right to challenge the conditions on appeal. Defendant's objection in the trial court preserved his claim of imposition of an invalid probation condition on appeal. We proceed to the merits of the argument. (*In re G.V.* (2008) 167 Cal.App.4th 1244, 1248 [84 Cal.Rptr.3d 809].)

Despite defendant's efforts to subvert any medical evaluation or diagnostic study, we find that inclusion of the psychological evaluation and medication requirement as a condition of probation is based on adequate evidence of need. The probation report

specifies that defendant's family indicated he "has mental issues." He was "described as having psychosis by Community Mental Health" personnel. The nature of the offense itself, and the content of defendant's e-mail, tend to strongly suggest underlying mental health issues which defendant refused to acknowledge. His lifestyle, as someone "homeless, illegally camping in multiple sites in the area of [the] Indian Valley Preserve," littered with feral cats, human waste, and camping gear, reinforces the concept of him as suffering from delusion and paranoia. As a result of many contacts with defendant, Deputy Bosse of the Marin County Deputy Sheriff's Department stated that he believed defendant "has grown more delusional" and represented a greater threat to law enforcement. Defendant repeatedly expressed his distrust of the criminal justice system. As the trial court recognized, defendant pervasively engaged in "delusional" thinking, exhibited in both his comments to law enforcement officers and conduct during trial. The court even gave an instruction to the jury that evidence of defendant's mental disorder may be considered for the limited purpose of deciding whether or not at the time of the charged crime he acted with the intent or mental state required for that crime.

That the record fails to provide more extensive or specific evidence of defendant's mental condition or medication options is due entirely to defendant's failure to assent to a medical assessment, meet with the probation officer, or provide requested mental health information. The record establishes that mental health evaluation and treatment of defendant is necessary to facilitate the prevention of future criminality and protect public safety. "If a probation condition serves the statutory purpose of ' "reformation and rehabilitation of the probationer," ' such condition is ' "reasonably related to future criminality" ' and will be upheld even if it has no ' "relationship to the crime of which the offender was convicted." ' [Citation.]" (*People v. Brewer* (2001) 87 Cal.App.4th 1298, 1311 [105 Cal.Rptr.2d 293].) Candidly, any other objective position based on this record strains credulity.

We further observe that the challenged probation condition is not as perfunctory as defendant asserts. Defendant's complaint that the order categorically requires him to "take medication as directed and submit to blood/urine testing to monitor medication

levels if requested," is incorrect. The court's pronouncement of the condition is properly tailored and more contingent in nature. First, the trial court directed defendant to participate in mental health evaluation to determine the need for medication. That, and the authorization of release of the records of his evaluation by community mental health staff to the probation department and the court, are the only unconditional provisions of probation. Participation in psychotherapy, administration of medication to defendant, and monitoring of blood or urine, are mandated only if treatment is recommended and medication is prescribed following the evaluation. Defendant is also entitled to a hearing if he opposes any prescribed medication. We conclude that mental health evaluation and treatment condition is tailored carefully and reasonably related to the compelling state interest in defendant's reformation and rehabilitation, and thus does not contravene the overbreadth doctrine or violate his constitutional privacy or liberty rights. (*In re Luis F.* (2009) 177 Cal.App.4th 176, 192 [99 Cal.Rptr.3d 174].)

V. The Denial of Defendant's Motion for Self-representation.

In a supplemental brief, defendant presents two additional contentions,[3] the first of which is that he was denied the "right of self-representation" pursuant to *Faretta v. California* (1975) 422 U.S. 806, 821 [45 L.Ed.2d 562, 95 S.Ct. 2525] (*Faretta*). Defendant claims the trial court erred by determining that his *Faretta* motion was untimely and involuntary.

The federal constitutional right of self-representation is "unconditional," but "not self-executing." (*Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1529 [36 Cal.Rptr.3d 854]; see also *People v. Bradford, supra*, 15 Cal.4th 1229, 1365.) "Criminal defendants have the right both to be represented by counsel at all critical stages of the prosecution and the right, based on the Sixth Amendment as interpreted in *Faretta, supra*, 422 U.S. 806, to represent themselves. [Citation.] However, this right of self-representation is not a license to abuse the dignity of the courtroom or disrupt the proceedings. [Citation.] *Faretta* motions must be both timely and unequivocal."

[3] Why these issues were not included in defendant's opening brief we do not know.

(*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1001–1002 [47 Cal.Rptr.3d 467, 140 P.3d 775]; see also *People v. Roldan* (2005) 35 Cal.4th 646, 683 [27 Cal.Rptr.3d 360, 110 P.3d 289].) "The right of self-representation is absolute, but only if a request to do so is knowingly and voluntarily made and if asserted a reasonable time before trial begins." (*People v. Doolin* (2009) 45 Cal.4th 390, 453 [87 Cal.Rptr.3d 209, 198 P.3d 11]; see also *People v. Stanley* (2006) 39 Cal.4th 913, 931–932 [47 Cal.Rptr.3d 420, 140 P.3d 736].)

We conduct an independent examination of the record to determine if a *Faretta* motion has been knowingly, timely and unequivocally asserted. (*People v. Doolin, supra,* 45 Cal.4th 390, 453; *People v. Stanley, supra,* 39 Cal.4th 913, 932.) We undertake our assessment " 'based on the " 'facts as they appear at the time of the hearing on the motion rather than on what subsequently develops.' " [Citations [and fn.] omitted.]' [Citation.]" (*People v. White* (1992) 9 Cal.App.4th 1062, 1072 [12 Cal.Rptr.2d 122].)

According to the record, after pursuing *Marsden* motions to substitute counsel, defendant appeared to present a *Faretta* motion on June 2, 2010. Trial was then scheduled at the end of June. At the hearing, defendant asserted that he was "not being adequately represented," and his counsel was "supposed to relieve himself to allow another public defender to take over the case." Defendant then denied that he wanted to represent himself, and the matter was dropped.

On June 17, 2010, at a status conference, with trial scheduled to begin a week later, through counsel defendant made another *Faretta* motion. The matter was continued to the next day for defendant to complete preparation of the motion. On June 18, 2010, defendant pursued the *Faretta* motion and declared that he wanted to present a *Marsden* motion due to a "legal blunder" by his attorney. He also requested representation by advisory counsel. Although both the prosecution and defense counsel were ready to proceed with the scheduled trial, defendant indicated that he had "no idea how long" he needed to prepare for trial.[4] After defendant was advised of the pitfalls of self-representation by the court and asked again if he wished to represent himself, he replied,

[4] Defendant stated that he was prepared to waive time.

"At this point, I have no choice," given what he perceived to be the inadequacies of his appointed attorney. When queried again, defendant reiterated that he was "absolutely compelled" to seek self-representation. The trial court denied the *Faretta* motion as untimely, and "not a voluntary, intelligent, knowing decision to represent yourself."

"[T]he timeliness of one's assertion of *Faretta* rights is critical." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 433 [64 Cal.Rptr.3d 721, 165 P.3d 512].) "If a request for self-representation is unequivocally asserted within a reasonable time before the commencement of the trial, and if the assertion is voluntarily made with an appreciation of the risks involved, the trial court has no discretion to deny it." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1219 [259 Cal.Rptr. 669, 774 P.2d 698]; see also *People v. Halvorsen*, *supra*, at p. 434; *People v. Dent* (2003) 30 Cal.4th 213, 217 [132 Cal.Rptr.2d 527, 65 P.3d 1286].) " 'When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion.' [Citation.] In exercising this discretion, the trial court should consider factors such as ' "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." ' [Citations.]" (*People v. Jenkins*, *supra*, 22 Cal.4th 900, 959; see also *People v. Lawley* (2002) 27 Cal.4th 102, 149 [115 Cal.Rptr.2d 614, 38 P.3d 461]; *People v. Windham* (1977) 19 Cal.3d 121, 128 [137 Cal.Rptr. 8, 560 P.2d 1187].) " 'The "reasonable time" requirement is intended to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.' [Citation.]" (*People v. Percelle* (2005) 126 Cal.App.4th 164, 175 [23 Cal.Rptr.3d 731].)

Recently, the court in *People v. Lynch* (2010) 50 Cal.4th 693 [114 Cal.Rptr.3d 63, 237 P.3d 416] (*Lynch*) elucidated and expanded upon the rudimentary standard of a reasonable time prior to commencement of trial, and for the first time definitively articulated the principles and factors that must be evaluated to determine the timeliness of a defendant's assertion of the right of self-representation. *Lynch* dispensed with a more

inflexible examination of timeliness in favor of scrutiny of the particular circumstances associated with the defendant's *Faretta* motion.

As a starting point, the court in *Lynch* observed that "*Faretta* nowhere announced a rigid formula for determining timeliness without regard to the circumstances of the particular case." (*Lynch, supra*, 50 Cal.4th 693, 724.) Rather, "timeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made." (*Ibid*.) The court declared "that a trial court may consider the totality of the circumstances in determining whether a defendant's pretrial motion for self-representation is timely. Thus, a trial court properly considers not only the time between the motion and the scheduled trial date, but also such factors as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation." (*Id*. at p. 726.)

We agree with the trial court's determination that defendant's motion for self-representation was both untimely and involuntary. While the case was neither a complicated one nor included gravely serious charges, the motion was delayed until only one week before the scheduled commencement of trial. Both sides were prepared to proceed with trial, and witnesses were ready to testify. Delay of an undetermined but lengthy duration would have been necessitated if the motion had been granted. The disruption of the proceedings necessitated by affording defendant the right to self-representation, which far exceeded the projected trial date, heavily disfavors a finding that the *Faretta* motion was made within a reasonable time prior to commencement of trial, particularly when we consider that the case was nearing completion. (*Lynch, supra*, 50 Cal.4th 693, 727.) Defendant also did not furnish a reason that adequately justified his delay in pursuing the *Faretta* motion. He had been represented by his current attorney for months and was aware of his right to seek substitute counsel, having done so in the past. He gave no reason why he waited to express displeasure with his existing

representation and the need to represent himself. His only reasons for the motion were a vague reference to counsel's failure to share strategy or provide him with documents. The reasons defendant offered to support his *Faretta* motion did not excuse defendant's tardiness in moving to represent himself. He cannot escape the "responsibility for timely invoking his right to self-representation." (*Lynch, supra,* at p. 727.) We find that defendant's motion for self-representation was untimely. The trial court therefore had discretion to deny the motion, and did not abuse that discretion by doing so. (*Id.* at p. 728.)

VI. The Failure to Give a Supplemental Instruction on the Standard of Lawful Duty within the Meaning of Section 69.

Defendant's final contention is that the trial court erred by failing to provide the jury with a definition of " 'lawful duty' or to instruct the jury to determine whether the conduct which [he] allegedly attempted to deter was in fact lawful." Defendant complains that without an instruction on the "principle of lawful duty," the jury was not properly directed to "decide that crucial element of the offense" specified in section 69. Defendant maintains that the "lawfulness of the conduct of executive officers" is an essential element of the charged violation of section 69. Therefore, the trial court had a sua sponte duty to define legal duty for the jury and instruct on "the prosecution's burden of proof on the issue." Specifically, defendant proposes the jury should have been advised of two facets of the lawful duty issue: first, that an "executive officer is not lawfully performing his or her duties if he unlawfully shoots at mountain lions and other wildlife," and second, pursuant to CALCRIM No. 2670, that the "People have the burden of proving beyond a reasonable doubt that Marin sheriff and Fish & Game personnel were lawfully performing their duties as peace officers."

To support his claim of instructional error defendant relies on the fundamental principle that, " 'In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case.' [Citation.]" (*People v. Anderson* (2011) 51 Cal.4th 989, 996 [125 Cal.Rptr.3d 408, 252 P.3d 968].) He also emphasizes

that a criminal defendant "cannot be convicted of an offense *against a peace officer* '*engaged in . . . the performance of . . . duties*' unless the *officer* was acting lawfully at the time. [Citations.] The rule flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in 'duties,' for purposes of an offense defined in such terms, if the officer's conduct is unlawful. [Citations.] [¶] California cases hold that although the court, not the jury, usually decides whether police action was supported by legal cause, disputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element, since the lawfulness of the victim's conduct forms part of the corpus delicti of the offense." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159]; see also *Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 894 [76 Cal.Rptr.3d 787, 183 P.3d 471].)

Here, the trial court gave the standard instruction (CALCRIM No. 2651) that defined the elements of a violation of section 69: "To prove that the defendant is guilty of this crime the People must prove that, one, the defendant willfully and unlawfully used a threat of violence to try to prevent or deter an executive officer from performing the officer's *lawful duty*. And two, when the defendant acted he intended to prevent or deter the executive officer from performing the officer's *lawful duty*." (Italics added.) The standard instruction provided the jury with the essential elements of the offense, including the requirement that the threat must relate to performance of a lawful duty. An additional instruction relating the particular facts of the defendant's case— that an executive officer is not performing lawful duties if shooting at mountain lions or other wildlife—to the jury's duty to acquit if the evidence produces a reasonable doubt, is a pinpoint instruction that was required to be given only upon request by the defense, and only if there is evidence supportive of the theory. (See *People v. Jennings* (2010) 50 Cal.4th 616, 674–675 [114 Cal.Rptr.3d 133, 237 P.3d 474]; *People v. Saille* (1991) 54 Cal.3d 1103, 1119–1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].) Without a request, the court did not err by giving the further definition of lawful duty proposed by defendant in this appeal. That part of the proposed instruction that the People have the burden of proving beyond a reasonable doubt that Marin sheriff and Fish & Game personnel were lawfully

performing their duties as peace officers was duplicative and unnecessary given the combination of the CALCRIM No. 2651 instruction and the standard reasonable doubt instruction given to the jury. (*People v. Griffin* (2004) 33 Cal.4th 536, 591 [15 Cal.Rptr.3d 743, 93 P.3d 344].) "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852 [111 Cal.Rptr.2d 129, 29 P.3d 209].) A "judge need not include a legally correct jury instruction when it is duplicative of other instructions provided to the jury." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 675 [21 Cal.Rptr.3d 612, 101 P.3d 509].)

It is also without dispute the record here contains no evidence that Fish and Game officials were engaging in any killing or misbehavior towards mountain lions at Indian Valley Open Space Preserve. It seems this *appellate* argument in the *supplemental* brief is predicated on speculative thoughts outside the trial record. No instructional error occurred.

DISPOSITION

Accordingly, the judgment is affirmed.

_____
Dondero, J.

We concur:

_____
Marchiano, P. J.

_____
Margulies, J.

People v. Nishi, A129724

Trial Court:	Marin County Superior Court
Trial Judge:	Hon. Paul M. Haakenson
For Defendant and Appellant:	Hilda Scheib, Esq.
For Plaintiff and Respondent:	Kamala D. Harris, Attorney General Dane R. Gillette, Chief Assistant Attorney General Gerald A. Engler, Senior Assistant Attorney General Seth K. Schalit, Supervising Deputy Attorney General Laurence K. Sullivan, Supervising Deputy Attorney General

People v. Nishi, A129724